No. 18891

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

STEWART'S DOWNTOWN MOTORS, et al,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief of Appellees

EVANS, KITCHEL & JENCKES
363 North First Avenue
Phoenix, Arizona 85003
Attorneys for Appellees

FILED
MAR 27 1954
FRANK H. SCHMID, CLERK

SORG PRINTING COMPANY OF CALIFORNIA, 180 FIRST STREET, SAN FRANCISCO 5

SUBJECT INDEX

Page

Jurisdiction 1

Statement of the Case 2

Summary of Argument 7

Argument 8

The Court Committed No Error in Directing Appellant to Proceed First with Its Evidence 8

Copperstate Had Actual Authority to Bind the Risk and at Least Apparent Authority to Reinstate Coverage 9

(a) Introductory note 9

(b) Copperstate "bound" the risk 10

(c) In the alternative, the policy was reinstated 13

Appellant Waived Forfeiture of the Policy When Copperstate Requested Payment of the Delinquent Installment 15

Appellant Is Estopped to Assert Cancellation of the Policy 17

(a) The elements of equitable estoppel are present 17

(b) The conduct of an insurance company's agent may estop the company from asserting cancellation or forfeiture of a policy 19

(c) Copperstate's interest were not "adverse" to Appellant's 24

(d) Appellees' reliance that coverage existed to and including April 16, 1962 was justifiable 25

Conclusion 27

Certification 27

TABLE OF AUTHORITIES CITED

Cases	Pages
American Life Association v. Vaden, 164 Ark. 75, 261 S.W. 320 (1924)	20
Baumann v. Metropolitan Life Ins. Co., 144 Wisc. 206, 128 N.W. 864 (1910)	20
Beatty v. Mutual Reserve Fund Life Ass'n., 75 F. 65 (9th Cir. 1896)	16
Continental Casualty Co. v. Bridges, (Tex.Civ.App.) 114 S.W. 170 (1908)	19
Exchange Trust Co. v. Capitol Life Ins. Co., (D.C.N.D. Okla.) 40 F.2d 687 (1930), affd. 49 F.2d 133 (10th Cir. 1931)	15
Faris v. American Nat. Assur. Co., 44 Cal. App. 48, 185 Pac. 1035 (1919)	16
Guipre v. Kurt Hitke & Co., 109 Cal. App.2d 7, 240 P.2d 312 (1952)	12
Heckman v. Harris, 66 Ariz. 360, 188 P.2d 991, (1948)	19
Holmes v. Graves, 83 Ariz. 174, 318 P.2d 354 (1957)	18
Jackson v. M.F.A. Mutual Insurance Company (D.C.W.D. Ark.) 169 F.Supp. 638 (1959)	21
Kazanteno v. California-Western States Life Ins. Co., 137 Cal. App.2d 361, 290 P.2d 332 (1955)	12
Kentucky Home Life Ins. Co. v. Johnson, 263 Ky. 787, 93 S.W. 2d 863 (1936)	11
Knapp v. Independence Life and Accident Insurance Co., (W. Va. S. Ct. App.) 118 S.E.2d 631 (1961)	21
Metropolitan Life Ins. Co. v. Mulleady's Adm'x., 21 K.L.R. 883, 53 S.W. 282 (1899)	17, 20
New York Life Ins. Co. v. Rogers, 126 F.2d 784 (9th Cir. 1942)	9

Pages

Occidental Life Insurance Company v. Jacobson, 15 Ariz. 242, 137 Pac. 869 (1914) 17, 23
Onekama Realty Co. v. Carothers, 59 Ariz. 416, 129 P.2d 918 (1942) 19

Pacific Fire Ins. Co. v. Donald, 148 Tex. 277, 224 S.W.2d 204 (1949) 12

Service Fire Ins. Co. v. Payne, 218 Ark. 499, 236 S.W. 2d 1020 (1951) 20
Smith v. Hartford Fire Ins. Co., (Mo.App.) 272 S.W. 700 (1925) 20
Stivers v. National American Insurance Co., 247 F.2d 921 (9th Cir. 1957) 23

Travelers Insurance Co. v. Sindle, (D.C.W.D. Ark.) 186 F. Supp. 8 (1960) 21

Union Life Insurance Co. v. Brewer, 228 Ark. 600, 309 S.W.2d 740 (1958) 22

STATUTES

Federal Rules of Civil Procedure, Rule 8(c) 9

28 U.S.C.:
§ 1291 2
§ 1332(a)(1) 1

TEXTS

16 Appleman, Insurance Law and Practice:
§ 7224 12
§ 8691 11
§ 8693 ..... 11, 14

No. 18891

In the

United States Court of Appeals

For the Ninth Circuit

UNITED STATES FIDELITY AND GUARANTY COMPANY, a corporation,
Appellant,

vs.

STEWART'S DOWNTOWN MOTORS, et al,
Appellees.

Appeal from the United States District Court
for the District of Arizona

Brief of Appellees

JURISDICTION

Appellant, a Maryland corporation, commenced this action for a declaration of its rights, duties and responsibilities under a policy of comprehensive liability insurance, the limits of which were well in excess of $10,000.00. (Exhibit 1) Appellees were individuals and corporations that were at all times citizens of Arizona. The pleadings established no issue as to the jurisdictional facts. (R. 4, 5, 13, 14) The District Court had jurisdiction pursuant to 28 U.S.C. § 1332(a)(1).

Judgment in favor of Appellees was entered on May 24, 1963. Appellant filed its Notice of Appeal on June 21, 1963.

Accordingly, this Court has jurisdiction by virtue of 28 U.S.C. § 1291.

STATEMENT OF THE CASE

Appellant's "Statement of the Case" omits many of the relevant facts that without doubt prompted the District Court to enter judgment for Appellees. Appellees elect, therefore, to exercise their privilege pursuant to Rule 18(3) of this Court to submit their own statement.

Appellant was a liability insurance company, with its principal offices in Baltimore, Maryland. Adjacent thereto were the offices of The Del Mar Company, a wholly owned subsidiary through which Appellant provided financing of premiums. (R. 99, 123) Such arrangements are common in the insurance business. (R. 123)

In conducting its liability insurance business in Arizona, Appellant did no direct business with the public. Instead, it marketed its product exclusively through agents it selected. A prospective insurance customer who inquired at the offices of Appellant invariably was referred to one of its agents, and he thereafter negotiated for and received a policy from the agent. (R. 90)

Prior to the time the insurance policy in question was issued, Copperstate Insurance Agency (an Arizona corporation, of which M. Wesley Douglas was president and Dick Smith III was vice-president and secretary-treasurer) became a general agent of Appellant for the Phoenix area. (R. 118) Appellant and Copperstate signed a written agency agreement. (Exhibit 2) The agency agreement did not specifically define the authority of the agent to bind the insurer to risks other than to state that Copperstate might issue and deliver ". . . binders which the Company may, from time to time, authorize to be issued and delivered." Although Appel-

lant never gave Copperstate any further instructions regarding the binding of risks (R. 129), Appellant's Arizona Manager admitted that in practice and by custom Appellant's agents had authority to bind it to certain risks without first consulting it:

> "Q. In other words, the agent binds the risk, and then notifies the company that the company has been bound with a risk, is that correct?
>
> A. They will write a policy and send us a copy of it, that is right. And of course they make the policy effective.
>
> We won't hear about it until the next day.
>
> Q. All right. You say that this is true with family automobile policies and fire policies, and policies like that?
>
> A. Policies that don't have an underwriting problem.
>
> A competent agent will recognize that there is an underwriting problem, and he should contact the company before binding it.
>
> Q. You say this is all due to custom, is that true, and practice in the insurance business?
>
> A. Yes." (Testimony of T. D. Gibson, R. 93)

In executing the agency agreement Appellant's Arizona Manager intended to grant Copperstate the same authority its other agents had. (R. 89)

Appellees consist of eighteen individuals and corporations who were engaged in the automobile and other businesses. (R. 102) They owned or possessed between 60 and 100 automobiles at any given time. (R. 103)

On or about August 22, 1961, and prior thereto, Appellant, acting through Copperstate, negotiated for and sold to Appellees a "comprehensive liability policy." (R. 145-146) The estimated premium (subject to adjustment at the end of the year, depending upon changes in Appellees' status) was to

be $10,151.69. (Exhibit 3) On September 21, 1961, Appellees, by Spencer D. Stewart, signed an invoice and note for $8,-290.17. The note was payable to Copperstate, and called for payments of $921.13 due on the 22nd day of September, October, November, December, January, February, March, April and May. Appellees made a "down payment" to Copperstate of $2,030.34, and in addition made at that time the September payment. Copperstate then assigned the note to The Del Mar Company. (Exhibit 3)

In all of the aforementioned dealings, the insured had no contact with the insurance company except through its agent, Copperstate. (R. 104)

Although the effective date of the policy was August 22, 1961, the policy was not delivered to the insured until two weeks or so later. (R. 122) When it was delivered, the policy bore the countersignature of Mr. Douglas. (R. 123) During the period between August 22 and the time the policy actually was delivered, the insurance was effective solely by virtue of Douglas' oral statement to the insured that coverage existed. (R. 121, 146)

On February 22, 1962, a payment was due on the premium note. As of that date, only *one-half* of the policy period had expired, whereas a total of $6,635.99 or roughly *two-thirds* of the estimated total premium had been paid. (R. 105-106) At about the time the payment was due the entire efforts of the Stewart employees responsible for making the payment were devoted to a local United Cerebral Palsy Drive and, particularly, to staging a "telethon" for that charity in Phoenix. (R. 107) The insurance payment was inadvertently overlooked. At all times, the Appellees were fully able, financially, to make the payment. (R. 111-112)

On the morning of March 19, 1962 B. Van Voorhis Munson, Controller of Appellees, received from The Del Mar

Company a notice to the effect that the finance company was exercising its rights under the invoice and note to declare a forfeiture and cancellation of the policy. (R. 108; Exhibit 5) Upon his receipt of the notice, Munson immediately telephoned Copperstate. (R. 108) He was responsible for maintaining Appellees' insurance coverage (R. 103), and had to take immediate action. Munson testified he told Smith:

> ". . . I couldn't afford to be without coverage, and I asked his suggestion as to what I should do to get coverage." (R. 109)

Smith told Munson to mail in the delinquent payment. Munson complied, sending the check air mail. (R. 109)

Smith's advice to Munson to mail the delinquent payment to Appellant's wholly-owned finance agency, Del Mar, was given at a time when:

1. No loss had occurred (the first accident occurred March 30, 1962). (Pre-Trial Stipulation No. 2, R. 45).

2. One payment, and only one payment, was due, i.e. the one due on February 22, 1962. (R. 105-106)

3. All Appellees' negotiations and discussions regarding the policy had been with Copperstate. None had been with Appellant directly. (R. 104)

Munson believed that by his compliance with Smith's request for payment to Del Mar coverage would continue. (R. 109) Had Smith not given him this advice Munson would have gone elsewhere for coverage. (R. 110) He relied upon Smith's advice, and believed Smith had authority to give such instructions. (R. 110)

Appellant's financing agency, Del Mar, accepted the payment and credited it to Appellees' account, but otherwise did nothing until March 23, although it would seem likely it received Appellees' check on March 21 at the latest. On March 23, the March 22 payment was one (1) day overdue.

Del Mar mailed a letter by regular mail, not air mail,* to Copperstate advising that no reinstatement could be requested until the March payment was made. (Exhibit 6; R. 127) Although Spencer Stewart was the addressee, Munson never saw that letter. (R. 111) Copperstate received a copy on March 27. (R. 127)

Smith did nothing about the notice until after the March 30 accident. (R. 127-128) According to Munson, Smith called him on April 5 and reminded him about the March 22 payment. (R. 111) Munson caused that payment to be made (R. 111), and Del Mar mailed a "Request for Reinstatement" (Exhibit 7) to Appellant's Phoenix Office on or about April 9. (Stipulation 1(g); R. 44)

On April 13, 1962 Appellant's Phoenix office sent a letter to Appellees (received April 16) advising them that because accidents had occurred the company would consider the policy cancelled effective March 16. This was Appellees' first communication of any kind from Appellant since the date of alleged cancellation. (R. 112) During the four (4) weeks that had passed since March 16 the insurer had neither refunded any part of the unearned premium nor had it even taken any action in computing the amount of refund. (R. 98)

Accidents involving Appellees and their agents and servants occurred on March 30, April 7, and April 10. (Stipulations 2 and 3; R. 45-46) Appellant denied any responsibility to Appellees with respect to these occurrences. Appellees proceeded to protect their interests by settling one claim and retaining attorneys to defend another. (Stipulations 2, 3 and 4)

The Del Mar Company tendered to defendants the sum of $2,852.72 as unearned premium, but Appellees refused to

*This inference necessarily arises from the fact that Copperstate received its copy four days later.

accept that amount and returned the check upon advice of counsel. (Stipulation No. 5; R. 47, 113) Prior to trial the parties entered into a stipulation as to the procedure to be followed in computing unearned premium in the event the effective cancellation date of the policy was judicially declared to be later than March 16, 1962. (Stipulation No. 5; R. 47)

The court found the issues to be in favor of Appellees and thereafter duly entered findings of fact and conclusions of law. The court's judgment declared the policy to have been in full force and effect at all times from August 22, 1961 to and including April 16, 1962; ordered that Appellees were entitled to performance by Appellant of its obligations under the policy with respect to any and all claims and events that occurred while the policy was in effect; and, awarded judgment for certain specific sums against Appellant in favor of Appellees. The judgment also provided that the court retained jurisdiction for the purpose of taking such additional evidence and making such further orders as might be necessary.

SUMMARY OF ARGUMENT

Although Appellant's finance company, Del Mar, was authorized by the invoice (Exhibit 3) to bring about a cancellation of the insurance, there is abundant legal authority to the effect that conduct of its agent may estop an insurer from asserting the cancellation or forfeiture of a policy of insurance.

In the case at bar, the insured sought advice from the insurer's chosen spokesman as to what to do to continue the coverage in force. The insurer demanded performance by the insured of their obligations, i.e. the payment to Del Mar. The insured dutifully obeyed, in the good faith belief that coverage existed. No loss had yet occurred.

Later, on April 13, 1962, after the accidents, it became apparent to Appellant's higher echelon that Policy No. CLP 69624 wasn't such a bargain after all. Appellant sought then, as it does now, to avoid its responsibilities under the policy by making use of Del Mar's cancellation notice.

The legal effect of the agent's conduct might variously be described as a "binder," a reinstatement of a cancelled policy, or mere estoppel to assert cancellation. The result is the same. Appellant is responsible for its obligations under the policy with respect to events and occurrences prior to April 16, 1962, the date Appellees received Appellant's first unequivocal declaration that it refused to perform, and that it considered the policy cancelled.

ARGUMENT

The Court Committed No Error in Directing Appellant to Proceed First with Its Evidence.

Appellant assigns as error the trial court's direction that Appellant proceed first with the presentation of its evidence. (Assignment of Error 18) Appellant then begins its Argument by asserting that the insured has the burden of proof to establish that a policy of insurance is in effect.

Having in mind that this case was tried to the court without a jury, that the trial court never expressly ruled on the question of who had the burden of proof, that no conclusion of law was entered with respect to burden of proof, and that the court entered no finding to the effect that the insured had failed to meet its burden of proof as to the establishment of any fact, it is difficult to understand why the question is relevant.

In any event, there is a basic fallacy in Appellant's position. Had the insured commenced an action for declaratory relief, it would have alleged and proved the issuance and

delivery of a policy of insurance and would thereafter have rested. The insurance company would have alleged as an affirmative defense the cancellation of the policy and would have had the burden of proof as to that affirmative defense. Rule 8(c), Federal Rules of Civil Procedure, provides in part as follows:

> "In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, res judicata, statute of frauds, statute of limitations, waiver, *and any other matter constituting an avoidance or affirmative defense.*" (Emphasis Supplied)

Under the circumstances the burden of proving a cancellation of the policy would have been on Appellant. *Cf. New York Life Ins. Co. v. Rogers,* 126 F.2d 784 (9th Cir. 1942).

Copperstate Had Actual Authority to Bind the Risk and at Least Apparent Authority to Reinstate Coverage.

(a) Introductory note.

At pages 5-6 and at page 15 of its brief Appellant attempts to distort counsel's opening statement (R. 100-101) into a concession that the policy was in fact cancelled. Appellees have never made any such concession, nor do they do so now. Appellees do not dispute the written terms of the invoice, nor do they dispute that Del Mar mailed a cancellation notice. It has at all times been Appellees' position that Appellant is estopped by its conduct to assert cancellation of the policy, and that irrespective of the estoppel argument Copperstate either bound the risk or reinstated the policy.

Appellees will set forth their estoppel argument in a later section of this brief.

(b) Copperstate "bound" the risk.

Viewed strictly as a contractual matter, the Smith-Munson telephone conversation of March 19, 1962, bound the company to continued coverage under the policy. It is reasonable to infer from the conversation an agreement that if Munson sent in the $921.13 payment on behalf of Appellees, coverage would not terminate. Appellees accepted the offer by doing the act called for, i.e., sending in the payment. Unquestionably, the promise to insure was supported by consideration—the benefit running to The Del Mar Company, and detriment to the promisees—the Appellees.

The record contains ample evidence that it was well within the scope of Copperstate's authority to bind this risk. First, the agency agreement (Exhibit 2) itself provides that the agent may "issue and deliver policies . . . and binders which the Company may, from time to time, authorize to be issued and delivered." By providing that "a report of risks assumed shall be made to the Company daily," the agreement further makes it clear that the assumption of risks by the agent is contemplated by the parties. T. D. Gibson, Arizona Manager for Appellant testified that according to custom the company's agents are authorized to bind risks "that don't have an underwriting problem." (R. 93) Both Smith and Douglas testified that they bound risks on behalf of plaintiff and were never told not to do so. (R. 129, 130, 148) Douglas, with twenty-five years' experience as an insurance agent, testified that it was general practice in the insurance business for agents to bind risks prior to notifying the company. (R. 148) Douglas considered the policy in question to be in most respects a "normal risk:"

> "A. In most respects it was a normal risk. This particular risk consisted of various enterprises, but that each individual enterprise, however, I believe by itself would prove to be a normal risk." (Testimony of M. Wesley Douglas, R. 151)

The testimony of Smith, Douglas and Gibson clearly established that Copperstate and Smith were "general agents" of the company, having authority to bind it to risks. On the subject of who is a general agent of an insurer and who is not, 16 Appleman, *Insurance Law and Practice,* § 8691, states:

> "It is true, as will be shown later, that a general agent can bind the insurer in many ways which a soliciting agent can not. It is important, however, to find a precise and exact test which will be susceptible of easy application. That test is whether or not the agent has the power to bind the insurer by his contract of insurance, or to issue policies on his own initiative, or to accept risks, and if the agent has actual authority to do these things, he is a general agent; if he cannot place coverage in effect, but can merely initiate negotiations therefor, he is not a general agent."

The general agent of an insurer stands in its stead in conducting its business, and has authority coextensive with that of the principal. Appleman, *op. cit. supra,* § 8693; *Kentucky Home Life Ins. Co. v. Johnson,* 263 Ky. 787, 93 S.W.2d 863 (1936).

From the standpoint of the insured, Copperstate certained appeared to have binding authority. The policy itself was signed by Douglas. Initially, coverage existed for two weeks solely on Douglas' oral statement to Appellees they were covered. (R. 146)

A finding that Copperstate bound Appellant to the risk on March 19, 1962 and thereafter for a reasonable time is

easily justified. With the March 19 payment, Del Mar and the insurance company had then received a total of $7,557.12 of the total premium of $10,151.69 (about three-fourths), with almost half the policy year yet to run. Certainly the company and Del Mar were adequately protected, so that if at a later time the matter could not be resolved satisfactorily, appropriate adjustments could be made.

The fact that the binder was oral is not important. Absent a statute to the contrary, a parol contract of insurance is valid and enforceable. *(Pacific Fire Ins. Co.* v. *Donald,* 148 Tex. 277, 224 S.W.2d 204 (1949); *Kazanteno* v. *California-Western States Life Ins. Co.,* 137 Cal.App.2d 361, 290 P.2d 332 (1955); *Guipre* v. *Kurt Hitke & Co.,* 109 Cal.App.2d 7, 240 P.2d 312 (1952).)

As a matter of insurance law Smith had authority to continue the coverage. Although the precise words were not used, the fair implication of Smith's statement to Munson was "if you send in the delinquent payment, you may rest assured that the same coverage will continue in force, and upon the same terms." When Smith so advised Munson, he spoke for the insurance company because it was within the scope of his implied authority as a general agent. Quoting from Appleman, *op. cit. supra,* § 7224:

> "An agent possessing power to bind the insurer has authority to bind it by a preliminary or temporary contract of insurance. A general agent is considered to have implied authority to write temporary policies, so as to bind the insurer by his agreement that a loss will be covered pending negotiations for a larger policy. And a general agent is authorized to bind a fire insurer by executing a binder, even though the binder was not delivered.
>
> "Where an agent is furnished with forms stating when accident and illness insurance should become effective, he had apparent authority to make a contract

> by filling in the blanks. And an agent authorized to issue and deliver insurance policies may, in the absence of contrary statute, bind the company to a temporary contract of insurance. The insurer is not entitled to deny the authority of a soliciting agent to execute a binder in the absence of notice of a limitation of the agent's authority to the applicant."

And later in the same section it is stated:

> "A statement by a general agent of the insurer that he will hold a risk 'covered' means that the insured is protected at once, and not merely that the agent will make a notation and issue a policy in the future."

The company was contractually bound by the promises and assurances of its general agent.

(c) In the alternative, the policy was reinstated.

Whether the technical name applied to what Copperstate brought about is a "binder" or a "reinstatement" really has little effect upon the legal result. The point is that Copperstate's assurances to Appellees either effected new coverage upon the same terms as Policy No. CLP 69624, or they revived the policy.

Appellant makes much of the fact that Gibson, Smith and Douglas all seemed to be agreed that Copperstate had no actual authority to "reinstate" a cancelled policy, as that term is understood in the insurance business, without Appellant's consent. But looking at the matter from the insured's standpoint:

1. Appellant maintained an "ivory tower" detachment from the public. E.g.:

> "Q. So it is true, then, that the United States Fidelity and Guaranty Company deals with the public only through independent insurance agents?
>
> A. Correct." (Testimony of T. D. Gibson, R. 90)

2. In fact, Appellees had never had any communication or dealings with Appellant, except through Copperstate, prior to April 16, 1962. (R. 112)

3. The policy existed as an insurance contract solely on the oral statement of M. Wesley Douglas for the first two weeks of its life. (R. 146)

4. The signature of Douglas made the formal contract effective as a policy of insurance. (Exhibit 1)

5. During the March 19 Smith-Munson telephone conversation the term "reinstatement" never was used, nor did Smith tell Munson what the intra-company mechanics of effecting coverage would be. (R. 143)

Under these circumstances, the general agent's conduct bound the company. As stated by Appleman, *op. cit. supra,* § 8693:

> "One seeking insurance from a general agent is not bound to inquire as to the precise instructions he has received from his company. The restrictions and limitations existing upon the authority of a general agent as between such agent and the company are not binding upon policyholders in their dealings with such agent, in the absence of knowledge on their part of such limitations."

In any event, whether the company, the company's finance agency and the company's agent followed company protocol in reinstating the policy should not decide the critical question of whether the policy was reinstated. The question should be decided by an objective examination of what transpired between the company, by its agent on the one hand, and the insured on the other. We submit that the agent had apparent authority to, and did, reinstate the insurance contract, even though the agent failed to abide by "company rules" in doing so.

Appellant Waived Forfeiture of the Policy When Copperstate Requested Payment of the Delinquent Installment.

When the agent, for and on behalf of his company, requested Munson to send in the delinquent payment, this was a recognition that the policy was still in force and was a waiver of any right the company might have had to a cancellation.

Quoting from dictum in *Exchange Trust Co. v. Capitol Life Ins. Co.,* (D.C.N.D. Okla.) 40 F.2d 687, 690 (1930), affd. 49 F.2d 133 (10th Cir. 1931):

> ". . . Where the insurance company holds a note to cover the unearned portion of a premium due upon a life insurance policy, which note provides that in default of payment the policy shall be terminated or become void, unconditionally demands payment of such note after maturity, the insurer must be held to have regarded the policy as in effect and to have waived its right to declare the policy forfeited or lapsed." (Citing cases)
>
> "The ground upon which this doctrine stands established is that the demand for the payment of the delinquent premium note, after maturity, is inconsistent with the position that the policy has lapsed for nonpayment of premium. The insurer could not insist upon a forfeiture and at the same time by its conduct treat the contract as still in force. The insurer, for whose benefit the forfeiture provision was made, has the unqualified right to waive such a stipulation and insist upon enforcement of the premium note for the unearned premium, and where the insurer has pursued such a course of conduct as to constitute a waiver of the forfeiture provision of the contract, and the reasonable deduction from the evidence is such as to imply a purpose not to insist upon a forfeiture, the insurer will be held liable."

In a case decided by this Court, *Beatty v. Mutual Reserve Fund Life Ass'n.*, 75 F. 65 (9th Cir. 1896), the following language was quoted with approval at page 69:

> "In determining whether there has been a modification of the terms of the policy by subsequent agreement, or a waiver of the forfeiture incurred by the nonpayment of the premium on the day specified, the test is whether the insurer, by his course of dealing with the assured, or by the acts and declarations of his authorized agents, has induced in the mind of the assured an honest belief that the terms and conditions of the policy, declaring a forfeiture in event of nonpayment on the day and in the manner prescribed, will not be enforced, but that payment will be accepted on a subsequent day, or in a different manner; and when such belief has been induced, and the insured has acted on it, the insurer will be estopped from insisting on the forfeiture."

Later in the opinion, at page 71, the Court made these observations on the limitations on the right of insurance companies to assert forfeiture of policies:

> "They cannot say at one time to the holder of a policy or certificate that, 'All we desire is your money, even if the premium or assessment is past due,' and accept it, and then at another time, or after the death of the insured, say that, 'You did not pay your premium or assessment when due, and our contract declares that, if not promptly paid, you have forfeited all your rights.' A forfeiture not being favored in the law, and being a matter of strict legal right, it follows that the party asserting it should be able to show that it has always inflexibly adhered to and insisted upon a strict compliance with the terms of its contract."

See also *Faris v. American Nat. Assur. Co.*, 44 Cal. App. 48, 185 Pac. 1035, 1038-1039 (1919), where it was said:

> "It is true that the policy provided that the insurance should ipso facto cease and determine upon the default of the insured; but, nevertheless, by the decisions of the Supreme Court of this state it has been held that, under similar provisions, if the insurance company, after knowledge of said default, enters into negotiations or transactions with the assured which recognize the continued validity of the policy, and treats it as still in force, the right to claim a forfeiture for such previous default is waived. Murray v. Home Benefit Life Association, 90 Cal. 402, 27 Pac. 309, 25 Am.St.Rep. 133."

And in *Metropolitan Life Ins. Co. v. Mulleady's Adm'x.*, 21 K.L.R. 883, 53 S.W. 282 (1899), quoting from the syllabus:

> "An insurance company cannot insist upon a forfeiture of a policy for the nonpayment of premiums, where the agent of the company has solicited and received payment of premiums after the right to a forfeiture accrued, representing that the policy was in full force and effect."

To the same effect is *Occidental Life Insurance Company v. Jacobson,* 15 Ariz. 242, 137 Pac. 869 (1914). (Discussed *infra.*)

Appellant Is Estopped to Assert Cancellation of the Policy.

(a) The elements of equitable estoppel are present.

From its findings the trial court concluded as a matter of law that Appellant was equitably estopped to assert a forfeiture or cancellation of the policy on any date prior to April 16, 1962. (Conclusion of Law No. 5, R. 61)

Munson was the person responsible for Appellees' insurance. (R. 103) Knowing that Appellees had perhaps as many as 100 automobiles (R. 103), Munson knew that he "couldn't afford to be without coverage." (R. 109) For the purpose of ascertaining the status of the insurance and what should be

done to assure coverage, Munson did the logical thing. He telephoned Copperstate, the only representative of Appellant with whom he had ever dealt. (R. 104)

Should he have telephoned the insurer's home office or its Phoenix office? The question must be answered in the negative, because Appellant did not deal directly with the public; it dealt with the public only through independent insurance agents. (R. 90)

Smith's instruction to Munson to mail the overdue payment to Del Mar was positive and without qualification. Both Smith and Munson believed that coverage would continue if Munson complied with the instruction. (R. 109, 126) Smith knew in his experience as an insurance agent that insurance companies commonly employ cancellation notices as means of stimulating payment of premiums. (R. 126) That Smith, an experienced insurance agent, believed that coverage would continue tends to support the proposition that Munson, a layman, relied in good faith also.

Munson had no way of knowing, nor did Smith tell him, what intra-company rules, regulations or procedures would have to be resorted to in continuing the insurance. It would be unfair to attribute knowledge of such "red tape" to Munson under the circumstances.

The facts present a classic case for application of the doctrine of equitable estoppel as it is understood in Arizona jurisprudence. In *Holmes v. Graves,* 83 Ariz. 174, 318 P.2d 354, 356 (1957), it was said:

> "Estoppel is quite generally predicated on conduct which induces another to acquiesce in a transaction, and that other, in reliance thereon, alters his position to his prejudice. It has three elements. First, acts inconsistent with the claim afterwards relied on; second, action by the adverse party on the faith of such conduct; third, injury to the adverse party resulting from the repudia-

tion of such conduct. See Kerby v. State, 62 Ariz. 294, 157 P.2d 698. Estoppel will be applied to prevent injustices, Munger v. Boardman, 53 Ariz. 271, 88 P.2d 536, and to transactions in which it would be unconscionable to permit a person to maintain a position inconsistent with one in which he has acquiesced. 19 Am. Jur. 676, Estoppel, Section 62."

And in *Heckman v. Harris,* 66 Ariz. 360, 188 P.2d 991, 992-993 (1948), the Court stated:

"'Equitable estoppel may be defined as the effect of the voluntary conduct of a party, whereby he is absolutely precluded from asserting rights which might have otherwise existed as against another person who, in good faith, has relied upon such conduct and has been led thereby to change his position for the worse. The essential elements of estoppel are that plaintiff, with knowledge of the facts, must have asserted a particular right inconsistent with that asserted in the instant action, to the prejudice of another who has relied upon his first conduct.'"

In *Onekama Realty Co. v. Carothers,* 59 Ariz. 416, 129 P.2d 918, 922 (1942), the Court observed:

". . . when one has lulled another into security by his conduct he cannot take advantage of such conduct until he has given an opportunity to the deceived party to restore the status quo."

(b) The conduct of an insurance company's agent may estop the company from asserting cancellation or forfeiture of a policy.

Many judicial decisions have applied the estoppel doctrine to prevent forfeiture of insurance policies.

In *Continental Casualty Co. v. Bridges,* (Tex.Civ.App.) 114 S.W. 170 (1908), the insured had applied for a renewal policy. When it was delivered he objected to it because the coverage was different from what he had expected. In spite

of the fact that the premium had not been paid, the agent handling the renewal advised the insured that he would be protected during the interim until issuance of the new policy. During the period a loss occurred, and the company asserted a forfeiture of the policy for nonpayment of the premium. It was held that the company was estopped to assert such forfeiture because of the acts of the agent.

Similarly, where an agent, when asked by the insured for an extension of premiums, told the insured to "let it go" and he "would write the company about it," but neglected to do so, the company was held bound in *Smith v. Hartford Fire Ins. Co.,* (Mo.App.) 272 S.W. 700 (1925). Where the agent advised the insured that his failure to make a payment or tender of premium would not forfeit the policy the company was held to be bound by such statement in *Baumann v. Metropolitan Life Ins. Co.,* 144 Wisc. 206, 128 N.W. 864 (1910).

In *Metropolitan Life Ins. Co. v. Mulleady's Adm'x.,* 21 K.L.R. 881, 53 S.W. 282 (1899), it was held that an insurer was estopped to assert a forfeiture of the policy where the agent had solicited and received premiums representing that the policy was still in full force and effect.

In *Service Fire Ins. Co. v. Payne,* 218 Ark. 499, 236 S.W. 2d 1020 (1951), the court, in discussing the estoppel doctrine, quoted from *American Life Association v. Vaden,* 164 Ark. 75, 261 S.W. 320, 324 (1924), as follows:

> ". . . 'forfeitures are not favored in the law,' and that 'courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action, on the part of an insurance company, which leads a party insured honestly to believe that, by conformity thereto, a forfeiture of his policy will

not be incurred, followed by due conformity on his part, will, and ought to estop the Company from insisting upon the forfeiture, though it might be claimed under the express letter of the contract.' "

In *Knapp v. Independence Life and Accident Insurance Co.,* (W. Va. S. Ct. App.) 118 S.E.2d 631 (1961), the court found the estoppel doctrine inapplicable, but defined it, at pages 636-637 of the S.E.2d Reporter, as follows:

"In the law of insurance the elements of an estoppel against an insurer are conduct or acts on the part of the insurer which are sufficient to justify a reasonable belief on the part of the insured that the insurer will not insist on a compliance with the provisions of the policy and that the insured in reliance upon such conduct or acts has changed his position to his detriment."

In *Travelers Insurance Co. v. Sindle,* (D.C.W.D. Ark.) 186 F.Supp. 8 (1960), it was said at page 17 of the opinion:

"It may be conceded that under the law of Arkansas a general agent of an insurance company has the power to waive any condition inserted in a policy for the benefit of the insurer and that forfeitures are not favored in law. The courts have held that any agreement, declaration or course of action on the part of an insurance company which leads a party insured honestly to believe that by conformity thereto, a forfeiture of his policy will not be incurred followed by due conformity on his part, will estop or ought to estop the company from insisting on a forfeiture, though it might be claimed under the express letter of the contract."

And in another case decided under the law of Arkansas, *Jackson v. M.F.A. Mutual Insurance Company* (D.C.W.D. Ark.) 169 F.Supp. 638, 644 (1959), the court stated:

" 'This court has often held that the doctrine of waiver and estoppel applies to insurance contracts, and that these principles will be liberally applied, when it is necessary to prevent injustice and fraud being

perpetrated by insurance companies upon their policyholders, when the latter have been misled or imposed upon by the agents of such companies.' "

In still another Arkansas case, *Union Life Insurance Co. v. Brewer,* 228 Ark. 600, 309 S.W.2d 740 (1958), an action on an accident policy, the agent of the company had collected the premiums in a manner other than was specified in the policy and such collections had been irregular. It was held that the insurer had waived the right to claim a forfeiture and a lapse of the policy for nonpayment of the premium. At pages 743-744 of the Southwest 2d Reporter the court said:

"Our well established general rule, as announced in many of our cases, is as follows: 'Forfeitures are not favored in law, and that courts are always prompt to seize hold of any circumstances that indicate an election to waive a forfeiture, or an agreement to do so, on which the party has relied and acted. Any agreement, declaration, or course of action on the part of an insurance company which leads a party insured honestly to believe that, by conformity thereto, a forfeiture of his policy will not be incurred, followed by due conformity on his part, will estop, and ought to estop, the company from insisting on a forfeiture, though it might be claimed under the express letter of the contract.

" 'Policy conditions as to forfeiture for the nonpayment of premiums or premium notes are regarded as being for the benefit of the insurer, and hence may be waived by it. . . . (Sec. 8401.)' Volume 15, Appleman on Insurance.

" 'Forfeitures are so odious in law that they will be enforced only where there is the clearest evidence that such was the intention of the parties. If the practice of the company and its course of dealings with the insured and others known to the insured have been such as to

> induce a belief that so much of the contract as provides for a forfeiture in a certain event will not be insisted on, the company will not be allowed to set up such forfeiture as against one in whom their conduct has induced such belief.' "

In a case decided in this Court, *Stivers v. National American Insurance Co.,* 247 F.2d 921 (9th Cir. 1957), the question was whether under a fire policy the premises were "occupied" within a requirement of the policy that the premises, in order to be covered, had to be occupied. The agent had advised the insured that under the circumstances the premises were occupied. It was held that the insurance company was estopped to disavow the construction of the policy which the agent had induced the insured to accept. The Court said at page 928:

> "Where, as here, a general agent of the insurer undertakes to advise a policy holder as to the meaning of a provision of the policy, and what will constitute full compliance therewith, the latter is entitled to rely thereon, unless such advice is in patent conflict with the terms of the policy."

The authorities cited above with respect to forfeiture of insurance policies also represent the law in Arizona. In *Occidental Life Insurance Company v. Jacobson,* 15 Ariz. 242, 137 Pac. 869, 870 (1914), the court stated:

> "We think the conduct of the defendant clearly indicated an intention upon its part not to insist upon the forfeiture provision in the policy, and that the insured at the time he made the payment on the note was led to believe that the company did waive the same, so it is estopped from claiming a forfeiture now.
>
> "Forfeitures are not favorites of the law. Courts are not slow in causes of this character to seize upon an opportunity whereby a liberal construction placed upon

> the acts of the insurer will bring about a waiver of a forfeiture provision placed in the contract of insurance for its benefit, if such a construction is demanded by the justice of the case, and is not repugnant to the law."

In summary, it would be clearly inequitable to permit the insurance company to assert a forfeiture or cancellation of the policy under the facts presented. Not only did its agent mislead the insured into doing nothing but it remained silent for a period of four weeks following the purported date of cancellation. Had it acted promptly and unequivocally in asserting the cancellation the problems presented by this lawsuit would have been avoided.

It seems reasonably clear that if Smith had called the Phoenix office of the company and related his conversation with Munson, the company would have acquiesced in Smith's actions. Unquestionably the risk was still acceptable to them. This is evidenced by the fact that even as late as April 16, 1962, the company issued a formal binder. (R. 150-151)

(c) Copperstate's interests were not "adverse" to Appellant's.

Appellant argues that Copperstate occupied a position "adverse" to Appellant because its commission was in jeopardy; that Appellees should have known this, and they therefore had a duty to inquire into the scope of Copperstate's authority.

First, the record is devoid of any evidence concerning the existence or amount of any commission payable to Copperstate, or the circumstances under which Copperstate would acquire or lose its commission.

More important, however, than the lack of evidentiary support for the argument is the fact that it is contrary to logic. Smith's election in behalf of his company to demand payment of the premium note rather than confirm the can-

cellation was no doubt influenced by a number of factors. There had been no change in the risk. No loss or accident had occurred. With an annual premium in excess of $10,000.00, and the reasonable expectation of annual renewals, Appellees' account represented a sizeable piece of business for both Copperstate and the insurance company. Counsel seem to have overlooked what their client knows only too well: Appellant is *not* a non-profit organization!

(d) Appellees' reliance that coverage existed to and including April 16, 1962 was justifiable.

As we understand Appellant's final argument, Del Mar seemed to follow an office procedure of sending the original of correspondence to Appellees with a copy to Copperstate; therefore, if Copperstate received, on March 27, a copy of a letter dated March 23, Del Mar must have sent the original to Appellees and Appellees must have received it also on March 27, because letters mailed are presumed received. Therefore, it is argued, Appellees must have known on March 27 there could be no reinstatement of the policy.

This argument lacks substance for several reasons.

To begin with, Appellant offered no evidence to the effect that Del Mar mailed the letter to Appellees. The pretrial stipulations provided only that a copy was received by Copperstate. (Stipulation No. 1(f), R. 44) Appellant's attempt to demonstrate an "office procedure" of mailing correspondence to Appellees by alluding to a few other occasions certainly is not evidence of an inflexible, routine office procedure.

There was no proof the letter was mailed. Accordingly, no presumption of Appellees' receipt of the supposed letter can arise. But even if it did arise such presumption or inference would quickly have disappeared with Munson's posi-

tive, direct testimony that he, the person responsible for the insurance, did *not* receive it. (R. 115)

In considering and weighing the equities the trial court had the right to consider Munson's testimony and either believe it or disbelieve it. Implicit in the court's findings and judgment is a belief of the testimony.

Munson heard nothing about the policy until April 5, when Smith advised making another payment to Del Mar, which Munson did. (R. 111) Once again, the insurance company, acting through its agent, requested Appellees' performance of their obligations. This is consistent only with the policy's being in force; it is inconsistent with the proposition that the company considered the policy concelled.

It was not until April 16, 1962 that Appellees were advised by Appellant that it denied responsibility for the accidents and that it would consider the policy cancelled effective March 16. After that letter was received, arrangements were quickly made to provide new coverage. (R. 150)

From March 19 to April 16 Appellees were reasonably led to believe and did believe that coverage existed. On two occasions the insurer requested payments on the premium note and Appellees complied. The Phoenix and Baltimore offices of the insurer stayed in their ivory towers and remained silent, while the insurer's finance company accepted the payments and credited them to the account. Certainly the insurance company must be charged with knowledge that Appellees believed they were covered. Insureds do not make payments on cancelled policies.

Clearly, Appellees were lulled into a feeling of security and dissuaded from protecting themselves at all times until April 16, 1962.

CONCLUSION

The judgment of the District Court recognizes the realities of the manner in which insurance business is transacted. Some insurers do exclusively a mail-order business. At least one operates in conjunction with a chain of department stores. Perhaps most use the independent agent, and some, like Appellant, use him exclusively.

The insurer is free to choose its mode of selling what it has for sale, but it must take the bitter with the sweet. If it chooses to isolate itself from the public and deal through agents, it must accept the responsibilities that are incurred along with the benefits that accrue.

The judgment of the District Court must be affirmed.

Respectfully submitted,

EVANS, KITCHEL & JENCKES
By NEWMAN R. PORTER
Attorneys for Appellees

CERTIFICATION

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing is in full compliance with those rules.

NEWMAN R. PORTER